

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
 . Detroit, Michigan  
 . August 28, 2013  
Debtor. . 10:00 a.m.  
. . . . .

HEARING RE. OPINION RE. STAY ISSUE

STATUS HEARING RE. CORRECTED MOTION TO ASSUME LEASE OR  
EXECUTORY CONTRACT

MOTION FOR PROTECTIVE ORDER

ADVERSARY PROCEEDING 13-04942 - STATUS CONFERENCE

BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Jones Day  
By: GREGORY M. SHUMAKER  
51 Louisiana Avenue, N.W.  
Washington, DC 20001-2113  
(202) 879-3679

Jones Day  
By: CORINNE BALL  
222 East 41st Street  
New York, NY 10017-6702  
(212) 326-7844

For Syncora Hold- Kirkland & Ellis, LLP  
ings, Ltd., Syncora By: STEPHEN C. HACKNEY  
Guarantee, Inc., 300 North LaSalle  
and Syncora Capital Chicago, IL 60654  
Assurance, Inc.: (312) 862-2074

For Detroit Honigman, Miller, Schwartz & Cohn, LLP  
Entertainment, LLC- By: JUDY B. CALTON  
Motor City Casino 660 Woodward Avenue, Suite 2290  
and Greektown Detroit, MI 48226  
Casino, LLC: (313) 465-7344

## APPEARANCES (continued):

For Ambac Assurance Arent Fox, LLP  
 Corporation: By: CAROLINE TURNER ENGLISH  
 1717 K Street, N.W.  
 Washington, DC 20036-5342  
 (202) 857-6178

For Financial Weil, Gotshal & Manges, LLP  
 Guaranty Insurance By: ALFREDO R. PEREZ  
 Company: 700 Louisiana, Suite 1600  
 Houston, TX 77002  
 (713) 546-5040

For Erste Ballard Spahr, LLP  
 Europaische By: VINCENT J. MARRIOTT, III  
 Pfandbrief-und 1735 Market Street, 51st Floor  
 Kommunalkreditbank Philadelphia, PA 19103-7599  
 Aktiengesellschaft (215) 864-8236  
 in Luxemburg, S.A.:

For FMS: Schiff Hardin, LLP  
 By: RICK L. FRIMMER  
 233 S. Wacker Drive, Suite 6600  
 Chicago, IL 60606  
 (312) 258-5511

For Retiree Lippitt O'Keefe, PLLC  
 Association By: RYAN C. PLECHA  
 Parties (Retired 370 East Maple Road, 3rd Floor  
 Detroit Police & Birmingham, MI 48009  
 Fire Fighters (248) 723-6263  
 Association,  
 Donald Taylor,  
 individually and  
 as President of  
 the RDPFFA, the  
 Detroit Retired  
 City Employees  
 Association and  
 Shirley V.  
 Lightsey,  
 individually and  
 as President of  
 the DRCEA):

Court Recorder: Letrice Calloway  
United States Bankruptcy Court  
211 West Fort Street  
21st Floor  
Detroit, MI 48226-3211  
(313) 234-0068

Transcribed By: Lois Garrett  
1290 West Barnes Road  
Leslie, MI 49251  
(517) 676-5092

Proceedings recorded by electronic sound recording,  
transcript produced by transcription service.

1           THE CLERK: All rise. Court is in session. Please  
2 be seated. Case Number 13-53846, City of Detroit, Michigan,  
3 and Case Number 13-04942, City of Detroit versus Syncora  
4 Guarantee, Incorporated, et al.

5           THE COURT: Okay. I'd like to begin with  
6 administering the oath of admission to attorneys who seek  
7 admission to the Bar of the Court. I think we have one  
8 today, Ms. Newbury.

9           MS. NEWBURY: Good morning, your Honor.

10          THE COURT: Good morning. And you are Ms. Newbury?

11          MS. NEWBURY: Yes, I am. Karen Newbury.

12          THE COURT: And are you prepared to take the oath of  
13 admission to the Bar of the Court?

14          MS. NEWBURY: Yes, I am, your Honor.

15          THE COURT: Please raise your right hand. Do you  
16 affirm that you will conduct yourself as an attorney and  
17 counselor of this Court with integrity and respect for the  
18 law, that you have read and will abide by the civility  
19 principles approved by the Court, and that you will support  
20 and defend the Constitution and laws of the United States?

21          MS. NEWBURY: I do, your Honor.

22          THE COURT: Welcome.

23          MS. NEWBURY: Thank you.

24          THE COURT: We'll take care of your paperwork for  
25 you.

1 MS. NEWBURY: Thank you very much.

2 THE COURT: Okay. One moment, please. Okay. So in  
3 terms of our order of proceeding today, I thought we would  
4 start with the Court's opinion regarding the stay issue and  
5 Syncora, and then we would do the status conference on the  
6 Syncora adversary proceeding, and then the status conference  
7 on the motion to assume and then the city's motion for a  
8 protective order regarding the data room and then if there's  
9 anything else anyone would like to bring up. Is that order  
10 okay with everybody? Okay. Perhaps so the record is clear,  
11 we should just take appearances in regard to this stay issue  
12 for the record.

13 MS. BALL: Good morning, your Honor. Corinne Ball  
14 for the City of Detroit.

15 MR. HACKNEY: Good morning, your Honor. Nice to see  
16 you again. It's Steve Hackney on behalf of Syncora.

17 THE COURT: All right. Thank you. The issue before  
18 the Court is whether the casino revenues in the subaccount  
19 held by U.S. Bank are property of the city protected by the  
20 automatic stay. It is the position of Syncora that these  
21 casino revenues in this account held by U.S. Bank are not  
22 property of the city. In the alternative, Syncora contends  
23 that either Section 362(b)(17) or Section 922(d) of the  
24 Bankruptcy Code apply to provide an exception to the  
25 automatic stay. The city contends that these funds are

1 property of the city.

2 Section 362(a)(3) of the Bankruptcy Code stays any  
3 act to obtain possession of property of the estate or of  
4 property from the estate or to exercise control over property  
5 of the estate. Section 902(1) makes the references in  
6 362(a)(3) to property of the estate to mean property of the  
7 debtor. So the application of the stay depends on whether  
8 the property is property of the city.

9 Syncora argues that the subaccount in which the  
10 casino revenues are held is similar to an escrow account,  
11 and, therefore, the funds in the account are not property of  
12 the city. Under New York law, apparently applicable here, an  
13 escrow is defined as, quote, "a written instrument which by  
14 its terms imports a legal obligation and which is deposited  
15 by the grantor, promisor, or obligor and -- or against  
16 thereof, with a stranger or third party to be kept by the  
17 depository until the performance of a condition or the  
18 happening of a certain event. The escrow relationship is of  
19 a fiduciary nature and has some characteristics of a trust,"  
20 close quote. This is from -- excuse me -- 55 New York  
21 Jurisprudence 2d Escrows Section 1. With an escrow account,  
22 the, quote, "incidents of ownership remain in the person  
23 depositing the property into escrow until the conditions of  
24 the escrow are fulfilled," close quote, 55 New York  
25 Jurisprudence 2d Escrows Section 9. See also 99 Commercial

1 Street, Inc. v. Goldberg, 811 F. Supp. 900 at 906, Southern  
2 District of New York, 1993.

3 Pursuant to the collateral agreement, the casino  
4 deposit -- the casino deposits -- sorry -- the casinos  
5 deposit the funds owed to the city into the subaccount. For  
6 the subaccount to be an escrow account, as Syncora argues,  
7 the arrangement would have to be such that the casinos would  
8 retain ownership of the funds; however, there is simply no  
9 basis in the collateral agreement for such a finding.

10 Likewise, there is no support for Syncora's  
11 alternative argument that U.S. Bank, as the custodian, owns  
12 the funds. The fact that the city is not in possession of  
13 the casino revenues is of no consequence in determining  
14 whether they are the city's property. See, for example,  
15 United States versus Whiting Pools, Inc., 462 U.S. 198, 103  
16 Supreme Court Reporter 2309, 1983. The Court must conclude  
17 that the casino revenues are, under applicable state law,  
18 property of the city.

19 Section 362(b)(17) of the Bankruptcy Code exempts  
20 from the automatic stay, quote, "the exercise by a swap  
21 participant or a financial participant of any contractual  
22 right (as defined in section 560) under any security  
23 agreement or arrangement or other credit enhancement forming  
24 a part of or related to any swap agreement, or of any  
25 contractual right (as defined in section 560) to offset or

1 net out any termination value, payment amount, or other  
2 transfer obligation arising under or in connection with 1 or  
3 more such agreements, including any master agreement for such  
4 agreements."

5 Section 101(53C) of the Bankruptcy Code defines swap  
6 participant as, quote, "an entity that, at any time before  
7 the filing of the petition, has an outstanding swap agreement  
8 with the debtor," close quote.

9 It is Syncora's position that the swap  
10 counterparties are swap participants and that Syncora has the  
11 right to direct the actions of the swap counterparties under  
12 the collateral agreement and that, therefore, any action  
13 taken by the swap counterparties at the direction of Syncora  
14 is not subject to the automatic stay. Syncora also contends  
15 that because it is a third-party beneficiary of the  
16 collateral agreement, it is a swap participant. The Court  
17 concludes, however, that there is no legal support for either  
18 of Syncora's arguments. Syncora is not a swap participant as  
19 that term is defined by the Bankruptcy Code, and the Court  
20 concludes, therefore, that it cannot rely on Section  
21 362(b)(17). If Congress had intended to include a party like  
22 Syncora within the definition of a swap participant on the  
23 grounds that Syncora now asserts, Congress could readily have  
24 done that with more expansive language, but it did not.  
25 Instead, it limited the definition to those who have swap



1 agreements with the debtor, which Syncora does not.

2           Lastly, Syncora argues that Section 922(d) of the  
3 Bankruptcy Code is applicable. That section provides, quote,  
4 "Notwithstanding section 362 of this title and subsection (a)  
5 of this section, a petition filed under this chapter does not  
6 operate as a stay of application of pledged special revenues  
7 in a manner consistent with section 927 of this title to  
8 payment of indebtedness secured by such revenues." Assuming,  
9 without deciding, that the funds on deposit with U.S. Bank  
10 are special revenues, this section is inapplicable. Syncora  
11 does not have a lien on the revenues. Further, the  
12 accumulation of the funds in the subaccount is not the,  
13 quote, "application of special pledged revenues to the  
14 payment of indebtedness," close quote. It is merely an  
15 administrative act. Therefore, there is no indebtedness to  
16 Syncora here.

17           Accordingly, the Court concludes that the casino  
18 revenues are protected by the automatic stay. The Court will  
19 prepare and enter an order to that effect. This order will,  
20 of course, be without prejudice to the right of any party to  
21 seek relief from the stay under Section 362(d).

22           So let's turn then to the adversary proceeding. In  
23 light of this order, is the city prepared to dismiss the  
24 adversary proceeding against Syncora and others?

25           MR. SHUMAKER: Your Honor, Gregory Shumaker of Jones

1 Day, for the record. It's a pleasure to be here. Your  
2 Honor, the answer to your question is -- well, first is --  
3 I'm not -- we obviously just heard your ruling, so a final  
4 determination as to whether we might be able to dismiss the  
5 case -- we would appreciate the opportunity to do that.  
6 We're not sure if your Honor's ruling, however, covers all of  
7 the factual findings that we would need and the declaratory  
8 judgment that the city is seeking with regard to Syncora's  
9 rights vis-a-vis the collateral agreement and the casino  
10 revenues, and so I think that that determination remains  
11 outstanding as does Syncora's lawsuit against the swap  
12 counterparties in New York where they will be seeking a  
13 similar -- and currently seek a similar -- not a similar  
14 declaration, but a declaration of their rights -- a  
15 declaratory judgment as to their rights. We also -- so I  
16 believe we still have the need to get those rights  
17 adjudicated finally, all of the rights that are asserted by,  
18 for example, Syncora in its motion -- its pending motion to  
19 dismiss. The New York action, too, remains out there. It's  
20 subject to a motion to transfer it to this Court. When -- if  
21 and when that action were to come here, perhaps a  
22 consolidation would be appropriate, but, in any event, I'm  
23 not -- I can't tell you right now, your Honor, that the city  
24 is amenable to a dismissal because we --

25 THE COURT: So if the motion to assume is denied,

1 that would moot out those claims as well; right?

2 MR. SHUMAKER: Well, it would depend on why your  
3 Honor denied it, I presume. There are multiple objections to  
4 the assumption motion. If it had to do with Syncora's  
5 rights, I think there is some question as to whether you will  
6 be making findings in that regard. We believe that you  
7 should, but we -- based upon earlier comments from your  
8 Honor, that seems to still be a question as to the --

9 THE COURT: Can you be more specific about what you  
10 want declared in the adversary proceeding?

11 MR. SHUMAKER: Well, in the adversary proceeding  
12 right now, it's a little bit complicated, your Honor,  
13 because, if you'll recall, the adversary proceeding was filed  
14 prior to the forbearance and optional termination agreement  
15 being executed. In fact, we pursued that so that the  
16 forbearance agreement could be executed -- or negotiated,  
17 finalized, and executed. So right now the TRO that we  
18 discussed last week relates to the city's allegations about  
19 the irreparable harm that it would suffer if the casino  
20 revenues were attached. Syncora has, in response to that  
21 complaint, filed a motion to dismiss, which asserts a broader  
22 set of rights to the casino revenues based not only on the  
23 collateral agreement but a number of other agreements, which  
24 your Honor is probably all too aware of at this point, but,  
25 you know, if the city would need to amend its complaint in

1 order to deal with those broader issues, I'm not sure, but  
2 the New York action that is still out there, your Honor, is a  
3 post-forbearance agreement suit, and it may or may not come  
4 here, so it's a bit complicated. And I'm not sure that your  
5 ruling is going to -- on the assumption motion is going to  
6 address that adjudication of rights.

7 THE COURT: Okay. So presently pending in the  
8 adversary are the two motions that we've been discussing, the  
9 motion to dismiss and the motion for a protective order; is  
10 that right?

11 MR. SHUMAKER: That's correct, your Honor. The  
12 motion to dismiss is not yet fully briefed. The city filed  
13 its reply brief earlier this week or late last week, and then  
14 the motion for protective order emanated from the discovery  
15 that Syncora sought back in the beginning of July, which we  
16 believe for a number of reasons was oppressive, and we should  
17 not be required to go through that.

18 THE COURT: Is it premature to set hearing dates on  
19 those two motions?

20 MR. SHUMAKER: Well, your Honor, I believe that the  
21 motion to dismiss reply brief is due September 12th, and  
22 certainly at that time that would be --

23 THE COURT: Obviously --

24 MR. SHUMAKER: -- I would think a threshold issue.

25 THE COURT: Obviously after that.

1 MR. SHUMAKER: Yes, your Honor, because I presume  
2 you would want to adjudicate that prior to discovery  
3 proceeding, if you will.

4 THE COURT: All right. We'll have to work with my  
5 schedule and the district courtroom's availability to provide  
6 you with a date. Mr. Hackney, would you concur that after  
7 September 12 we can set hearings on these two motions?

8 MR. HACKNEY: Absolutely, your Honor. If I could --  
9 I guess I have a couple quick observations --

10 THE COURT: Sure.

11 MR. HACKNEY: -- that might facilitate things. I  
12 guess it seems to me that the TRO is dissolved and that  
13 logically that the preliminary injunction motion would be  
14 withdrawn. Now, if I'm wrong about that, I'll --

15 THE COURT: Well, let's inquire.

16 MR. SHUMAKER: With the stay in place, your Honor,  
17 that would be fair, yes.

18 THE COURT: All right. There you go.

19 MR. HACKNEY: The protective order -- the discovery  
20 we sought was principally in connection with the anticipated  
21 preliminary injunction hearing that we might have. If there  
22 is no preliminary injunction hearing, I do not believe that  
23 there is a need for expedited interim discovery. I would  
24 instead propose that we proceed in the normal course under a  
25 Rule 26 discovery conference, so I view that as sort of

1       mooting the protective order issues. I had a --

2               THE COURT: Would you concur with that, sir?

3               MR. SHUMAKER: I would, your Honor.

4               THE COURT: All right. So all we'll set for hearing  
5       is the motion to dismiss.

6               MR. HACKNEY: That hopefully streamlines things,  
7       your Honor.

8               THE COURT: Good. Thank you.

9               MR. HACKNEY: I had a -- I did have a favor to ask,  
10       which is we've been running relatively hard. We are able to  
11       do two things at once, but I will tell you we've been  
12       relatively busy. I was wondering if I could have an  
13       extension of time of four days until September 16th to do our  
14       reply brief. The briefs in this --

15              THE COURT: Any objections?

16              MR. SHUMAKER: No, your Honor.

17              MR. HACKNEY: And then we would, of course, be  
18       willing to argue before -- subsequent to that time.

19              THE COURT: All right.

20              MR. HACKNEY: And those were all of the issues that  
21       I had to discuss today.

22              THE COURT: Okay.

23              MR. HACKNEY: Thank you.

24              THE COURT: Okay. All right. In regard to the  
25       motion to assume, is there -- are there any issues or

1 comments or suggestions that anyone would like to make in  
2 regard to that?

3 MR. SHUMAKER: Your Honor, there are a few scattered  
4 issues. I should apprise your Honor of this. You may have  
5 noticed that deposition notices were filed. Mr. Buckfire's  
6 deposition is scheduled for 9:30 tomorrow morning, and Mr.  
7 Orr's deposition is set for Friday at 8:30. One issue that's  
8 arisen as the -- and I've been dealing with Mr. Hackney,  
9 who's been the liaison for the objectors -- is consistent  
10 with your Honor's guidelines or at least proposed guidelines  
11 for the September 9th hearing where we -- where the  
12 suggestion, I believe, your Honor, was three hours for the  
13 city to put on its case and then the objectors three hours to  
14 respond. We were -- one of the things that we did was we  
15 withdrew one of the proposed witnesses, Gaurav Malhotra, who  
16 is with Ernst & Young, who submitted a declaration on the  
17 first day. We did that to -- because we wanted to  
18 consolidate. We know that this is not supposed to be a mini  
19 trial. Your Honor really was not looking for, I think,  
20 extensive discovery and had the debtor put forward its  
21 witnesses, and those depositions are the ones that are going  
22 to occur. We withdrew that. There seems to be a developing  
23 question as to whether the Court can take judicial notice of  
24 Mr. Malhotra's first day declaration, which is in the record.  
25 There are a few paragraphs that relate to the COP's and the

1 swaps and the assumption motion. I'm not -- we've had some  
2 discussions earlier today just before coming into court. If  
3 your Honor is able to do that, wants to take judicial notice  
4 of Mr. Malhotra's testimony, then we would continue to leave  
5 him off. If your Honor, however, believes that he needs to  
6 appear as a witness and in order for that declaration to  
7 get -- gain weight from the Court, which it would have if we  
8 had not had discovery presumably, then I think we would have  
9 to revisit the notion of Mr. Malhotra's presence on our  
10 witness list.

11 THE COURT: Well, I'm certainly willing to take  
12 judicial notice of the fact that there is an affidavit there,  
13 but that's not particularly pertinent. You want me to take  
14 judicial notice of the facts that he asserts in his  
15 affidavit?

16 MR. SHUMAKER: Well, as you would have, your Honor,  
17 if there had not been discovery. If you had -- if you had --  
18 if you had proceeded on the papers for the assumption motion,  
19 you would have considered the declaration and given it  
20 whatever weight you believe necessary. And given the --

21 THE COURT: Well, but that's subject to the  
22 opportunity of the opposing parties to question the witness.

23 MR. SHUMAKER: I guess if you were then going -- if  
24 you were going to look at the city's motion to assume and  
25 then have discovery on it, but at least it was my



1 understanding, your Honor, that you were limiting that  
2 discovery to just the debtor's witnesses that were going to  
3 appear at the hearing so that the objectors would have some  
4 idea of what -- how they would cross-examine the witness as  
5 opposed to, you know, reopening the issue of what evidence  
6 had been submitted to your Honor in connection with the  
7 motion.

8 THE COURT: Well, the Rules of Evidence apply, and  
9 what he says in his affidavit is hearsay even though it's in  
10 a court-filed document, so unless the parties opposing -- all  
11 of them are willing to waive that hearsay objection, which I  
12 would doubt, I would have to sustain any effort on your --  
13 sustain an objection to any effort on your part to offer it  
14 into evidence to prove the truth of any of the matters  
15 asserted in it.

16 MR. SHUMAKER: Your Honor, if that's your ruling,  
17 then I would ask if we could reserve the right to put Mr.  
18 Malhotra back on our witness list and schedule a deposition  
19 for him. Now, the deadline that you previously set was  
20 August 30th. I'm not certain of his availability at the  
21 moment. If that deposition moved a couple days into next  
22 week, would that be all right with your Honor?

23 THE COURT: It's fine with me so long as we can  
24 stand firm with our hearing date.

25 MR. SHUMAKER: Sure, sure. And I presume we could

1 do that. As your Honor knows, after Mr. Orr's deposition  
2 concludes on Friday, the rebuttal witnesses will be named  
3 within 24 hours, so those will be going on at the same time.

4 THE COURT: Mr. Hackney.

5 MR. HACKNEY: Well, I guess I'll just say that I  
6 think the city made a decision about what witnesses it was  
7 going to call, and it withdrew one of them, and now it's  
8 regretting the evidential implications for the hearing, and  
9 so I guess for me it's simple, which is when they decided to  
10 withdraw Mr. Malhotra, they took him off the case as someone  
11 that they could call at the hearing, and now they're asking  
12 you to amend the discovery schedule that they previously, I  
13 think, were agreeable to because of their decision to  
14 withdraw him, so I guess I don't follow the cause for it.  
15 That's all I'll say, your Honor. We'll be guided by your  
16 decision.

17 THE COURT: Well, the question the Court needs to  
18 address in these circumstances is how would the city's  
19 changing its mind again prejudice your presentation or the  
20 presentation of others at the hearing?

21 MR. HACKNEY: Yeah. And I guess the answer to  
22 that -- I mean I've been coordinating all these folks, and  
23 we've actually been working well in concert together. I want  
24 to share credit with the other objectors. It's been very  
25 constructive. It's not that easy.

1 THE COURT: Right.

2 MR. HACKNEY: And so what we've been trying to do is  
3 be orderly in the way we depose these witnesses so it's not  
4 just this chaotic deposition, and so when Malhotra came off,  
5 a lot of prep for that deposition didn't happen. If he went  
6 back on, we would want it to be sometime after the Labor Day  
7 holiday so that whomever can get ready for it. That's, I  
8 guess -- I wouldn't want to try and jam it into this week. I  
9 would want it to be like on Thursday or Friday of that  
10 following week just so whomever -- in light of the holiday  
11 and et cetera.

12 THE COURT: Okay.

13 MR. HACKNEY: Sorry, your Honor.

14 THE COURT: No. I appreciate it and understand it.

15 MR. PEREZ: Good morning, your Honor. Alfredo  
16 Perez. I represent FGIC. Two things, your Honor. With  
17 respect to how you want the evidence presented, one of the  
18 things that we would like to do is to make a presentation  
19 with respect to how the swaps work in connection with the  
20 COP's. And we could certainly do that through a witness, but  
21 I think, since it's a matter of, you know, reading the  
22 documents, if the Court would indulge just a straightforward  
23 presentation, that might expedite things. I don't think it's  
24 particularly -- it would be particularly controversial, so  
25 that's one thing.

1           THE COURT: Well, if you don't think it would be  
2 controversial, what I would encourage you to do is work with  
3 the city on a joint statement.

4           MR. PEREZ: We can certainly do that, your Honor.  
5 Then the other thing, your Honor, is I was tasked by the  
6 various objectors to file a statement yesterday requesting  
7 some additional time, and --

8           THE COURT: I saw that.

9           MR. PEREZ: And, your Honor, we would -- if the  
10 issue were just the objectors versus the city, I think that  
11 we could certainly comply -- fully comply and do a good job  
12 for our clients, but there are -- as between the objectors,  
13 there's really a lot of different issues, and, in fact, you  
14 know, we're much more aligned with Syncora than we are with  
15 anybody else since Syncora and FGIC are the only two people  
16 who actually insure the swaps, so I would request additional  
17 time with respect to that, your Honor.

18          THE COURT: Six hours?

19          MR. PEREZ: I think we could do it in six hours,  
20 your Honor.

21          THE COURT: You're dubious about even that?

22          MR. PEREZ: Well, it depends. Let me give you --  
23 and that's why I asked the first question.

24          THE COURT: Fully understanding that the issue here  
25 is only whether to assume or reject this. It has -- the

1 issue is not who has what rights under this contract.

2 MR. PEREZ: I understand that, your Honor, but I  
3 think in order -- in order for us to do a good job of  
4 presenting whether we think -- you know, basically the facts  
5 so that we can argue them to the Court, I really -- we really  
6 kind of do think that the Court needs to understand the  
7 transaction, and it's a complicated transaction.

8 THE COURT: Well, but you're going to come up with a  
9 joint statement with the debtor on that point.

10 MR. PEREZ: Well, we're certainly going to try.

11 THE COURT: Let's negotiate. Five hours, and you  
12 come up with a joint statement.

13 MR. PEREZ: We'll do that, your Honor. Thank you.

14 THE COURT: Anything else in regard to preparation  
15 for the hearing on the motion to assume? Sir.

16 MR. MARRIOTT: Briefly, your Honor. Vince Marriott,  
17 Ballard Spahr, on behalf of EEPK. I would just like to echo  
18 Mr. Hackney's observation that coordinating preparation for  
19 these depositions among the objectors has been a complicated  
20 process, and we've been designating who's going to prepare  
21 for what, and Ballard Spahr has been heavily involved in that  
22 process. When that one witness came off, it did affect the  
23 preparation. And if the witness is going back on, we really  
24 do need time to sort of reload in preparing for that witness.

25 THE COURT: Yes. Thank you. Let me just ask will

1 this witness be available Thursday or Friday of next week?

2 MR. SHUMAKER: Your Honor, I don't know, but I will  
3 certainly attempt to make him available then.

4 THE COURT: Well, doesn't he pretty much have to be  
5 in order for our hearing date to proceed and to --

6 MR. SHUMAKER: Yes. You know --

7 THE COURT: -- give the objecting parties the time  
8 they have requested?

9 MR. SHUMAKER: So the request, your Honor, just so  
10 I'm clear, is that it's on Thursday or Friday of next week.

11 THE COURT: That's what I heard.

12 MR. SHUMAKER: Okay.

13 THE COURT: Okay.

14 MR. SHUMAKER: I don't know of him being out of the  
15 country or anything like that, your Honor, but I'll do  
16 everything within my power to make that happen. And I'm sure  
17 the odds are extremely low that he would not be available.

18 THE COURT: Well, I hope you understand that if he's  
19 not available for deposition, it will be challenging to  
20 establish that he should be called as a witness.

21 MR. SHUMAKER: Understood, your Honor. Understood.

22 THE COURT: Sir.

23 MR. FRIMMER: Good morning, your Honor. Rick  
24 Frimmer from Schiff Hardin representing FMS Wertmanagement,  
25 which was incorrectly listed previously as DEPFA Bank, PLC.

1 THE COURT: Okay.

2 MR. FRIMMER: I almost hesitate to do this, but just  
3 to remind counsel that next Thursday and Friday are the  
4 Jewish holidays. Some of us won't be available. So whether  
5 or not the witness is available does cause of a bit of a  
6 monkeywrench for some of the other players, so --

7 THE COURT: That's a problem.

8 MR. FRIMMER: -- I just wanted the Court and the  
9 counsel to be sensitive to that.

10 THE COURT: Well, let me ask is Wednesday an  
11 acceptable day, and can you all prepare in time for the  
12 deposition on that date?

13 MR. FRIMMER: As Mr. Hackney correctly noted, we've  
14 been trying to work together to coordinate this. I'm sure  
15 someone will be available. I just wanted to alert the Court  
16 just to remind everybody that some portion of the populous  
17 here will not be available.

18 MS. ENGLISH: Good morning, your Honor. Caroline  
19 English from Arent Fox on behalf of Ambac. Just to point out  
20 another wrinkle, if Malhotra testifies, we need the right to  
21 call a potential rebuttal witness, which is going to put more  
22 time into the schedule, and right now our hearing is  
23 scheduled for Monday. Thank you, your Honor.

24 THE COURT: I was wondering when that issue was  
25 going to arise.

1 MR. HACKNEY: Your Honor --

2 THE COURT: Sir.

3 MR. HACKNEY: I was wondering. I guess I'd like to  
4 stick my head in the lion's mouth, so to speak, because I  
5 think the Court has been clear that you want to have this  
6 hearing on September 9th, and I appreciate that. I  
7 understand what you're trying to do. I really do. I've been  
8 in situations before where it makes sense to hold the foot on  
9 the accelerator, but I did want to make an observation to the  
10 Court in light of two developments. One of them is that  
11 today you held that the city is going to have at least  
12 interim access to these casino revenues during its case, and,  
13 second, under the forbearance agreement, what's ostensibly  
14 driving the schedule and the hurry-up is the idea that if  
15 they don't get a final and unappealable order by September  
16 16th, which is 60 days from the commencement of the case, the  
17 swap counterparties may terminate the forbearance agreement.  
18 It's a fact today that they will not have a final and  
19 unappealable order by September 16th. That is already  
20 established. If the Court's order is final, it will be  
21 appealable, and if it's not final and unappealable, then it  
22 won't be final. I just raise this to ask a practical  
23 question about whether or not we need to strictly adhere to  
24 the schedule in light of some of the challenges it's posing.  
25 And I also wanted to add one thing, your Honor, that may be



1 nearer and dearer to your heart, which is it impacts things  
2 like the mediation. You know, I'm part of the Syncora team.  
3 I'm not going to the mediation tomorrow because I have to be  
4 in the deposition. I know Mr. Marriott was originally  
5 planning to take the Buckfire deposition, but now he's going  
6 to the mediation. We can do two things at once. We can take  
7 depositions and mediate, but there is sometimes a desire to  
8 see whether a mediation can be fruitful before parties take  
9 up the time and expense of litigation, and it seems to me  
10 that even a two- to three-week adjournment of the hearing may  
11 solve many of the different issues that are coming up. Just  
12 a suggestion, your Honor.

13 THE COURT: Anyone else want to say anything?

14 MR. SHUMAKER: Your Honor, one -- excuse me -- two  
15 things. One, I've been asked to advise your Honor that a  
16 retirees' committee has been formed and is, I think, in the  
17 process of retaining counsel, who is here, Carole Neville of  
18 Dentons, and I believe she may wish to address the Court, but  
19 before she does, if I would, your Honor, if the objectors  
20 would have five hours and Mr. Malhotra is on the slate for  
21 the city, we'd ask this, that we be given an hour to make  
22 sure that we could get his testimony because we were --

23 THE COURT: So you want four instead of three?

24 MR. SHUMAKER: Exactly, your Honor. One of our  
25 considerations was how can we do three witnesses in three

1 hours.

2 THE COURT: Is he available next Wednesday?

3 MR. SHUMAKER: I can check on a break. I could  
4 leave right now if your Honor would --

5 THE COURT: All right. I'm going to give you that  
6 opportunity and sit here while you do that. Wait. What?  
7 The issue is use of the telephone?

8 MR. HERTZBERG: He can't use it out in the hallway,  
9 your Honor, under the rules of the District Court. He has to  
10 go downstairs.

11 THE COURT: I will grant you relief from that --

12 MR. SHUMAKER: Thank you, your Honor. Be right  
13 back.

14 THE COURT: -- and instruct the security personnel  
15 to allow you to use your phone in the hallway.

16 MR. SHUMAKER: Thank you, your Honor.

17 THE COURT: Thank you, Mr. Hertzberg.

18 (Pause at 10:37 a.m., until 10:41 a.m.)

19 MR. HACKNEY: Your Honor, can I propose something to  
20 the Court while we're waiting on this information?

21 THE COURT: Sure.

22 MR. HACKNEY: I understand the city's sensitivity on  
23 the subject of the schedule because under the forbearance  
24 agreement they have a best efforts obligation, best efforts  
25 to try and get this final appealable order within 60 days, so

1 I respect the fact that they need to exercise best efforts,  
2 but I think the objectors in the court, we don't have that  
3 obligation, and what I would propose is that we continue the  
4 hearing one month and that the city vigorously oppose my  
5 motion for a continuance. And, your Honor, I think that may  
6 allow for a number of things to happen that are potentially  
7 conducive both to the use of your time, which is also  
8 occupied by other matters, and to the coherence of the  
9 presentation and to the mediation, and the city will comply  
10 with its best efforts obligation to attempt to get a final  
11 appealable order within 60 days, which, by the way, it  
12 already cannot get, but it has used its best efforts.

13 THE COURT: Ms. Ball.

14 MS. BALL: Thank you, your Honor, with vigor. Your  
15 Honor, Mr. Hackney has correctly calculated the dates, so I  
16 cannot contest his description of where we will find  
17 ourselves should your Honor approve the settlement and the  
18 assumption of the forbearance agreement. We do also have the  
19 obligation that Mr. Hackney has described as a best efforts  
20 obligation. Your Honor, we have all tried mightily, and my  
21 partner, Greg, is out trying to find out if we can do a  
22 deposition on Wednesday. I certainly question whether a  
23 month is necessary because, your Honor, there are other  
24 economic provisions in the agreement, which Mr. Hackney may  
25 not be as aware of at this point, but I'm sure by the time of

1 our hearing he will be, where some of the economic benefits  
2 that we must obtain are important. But in fairness to your  
3 Honor, our ability to obtain those economic benefits is in  
4 some respects tied to two other events, which are on a  
5 different schedule, and those two other events, your Honor,  
6 you scheduled with an order earlier this week, the  
7 eligibility hearing as well as, your Honor, any effort to  
8 obtain -- and we are working mightily -- post-petition  
9 financing. Actually funding it will likely require a  
10 resolution of the eligibility issue. So we have not just the  
11 parallel tracks of mediation and litigation. We actually  
12 have the track -- if the city is going to get the benefit  
13 of -- one of the reasons why it did this, clearly one, your  
14 Honor's ruling -- we thank you; it was very important -- was  
15 getting immediate access, continuing access to casino  
16 revenues, and I certainly am grateful for your ruling and  
17 don't want to under -- in any way understate the importance  
18 of that. So, your Honor, I really question whether or not 30  
19 days is appropriate. I do think that if -- in fairness to  
20 the Court and in light of what you've already heard certainly  
21 from Mr. Perez on behalf of FGIC and from Ambac as well as  
22 Syncora, this is complicated, and a better presentation --  
23 the more we work out in advance of this hearing, the better  
24 off we will all be in terms of as much being stipulated facts  
25 and a very short succinct but accurate joint statement. So

1 with that, your Honor, we are -- we will go forward on  
2 September 9th assuming Mr. Malhotra is available on  
3 Wednesday, but at my -- discharging my obligations to this  
4 Court, I have to just make those three points. That  
5 condition is virtually impossible to meet through no fault.  
6 Secondly, there are other -- two other deadlines out there  
7 that we're mindful of for getting the economic benefit. Your  
8 Honor, I'm talking about when the discount of 75 percent  
9 increases to 77, so we think a month is too long if you're  
10 even considering this motion. And, thirdly, your Honor, as  
11 I've apprised you, we're going to be somewhat in a bind with  
12 financing on the schedule, so a short adjournment would not  
13 injure the city terribly, but obviously, your Honor, we will  
14 be prepared to go forward on September 9th, if that's your  
15 Honor's ruling, on the motion for continuance. Thank you.

16 THE COURT: Ms. Ball or Mr. Hackney, what are your  
17 appearance obligations in relation to mediation?

18 MR. PEREZ: Thursday, your Honor, is the mediation  
19 with respect to the swaps, and then on the 17th is the  
20 overall mediation. And I would imagine that there would be  
21 other dates set as soon as we have those dates.

22 MS. BALL: And, your Honor, the retirees' committee  
23 has asked to participate in the assumption, and they have to  
24 get up to speed.

25 THE COURT: Right.

1           MR. PLECHA: If I may, your Honor, Ryan Plecha on  
2           behalf of the Retiree Association Parties. It is my  
3           knowledge that counsel for the committee has been selected,  
4           but it has not yet been formally retained. But it does wish  
5           to participate relative to the motion on the lease, so I did  
6           just want to make that clear for the Court.

7           THE COURT: Thank you.

8           MR. PLECHA: Thank you.

9           THE COURT: What is your report, sir?

10          MR. SHUMAKER: Your Honor, I'm sorry. As luck would  
11          have it, we called his office, his cell, and e-mailed him and  
12          haven't heard anything yet. Perhaps by the time we adjourn,  
13          I'll know if I can keep looking at my Blackberry. I'm sorry.

14          THE COURT: One more second, please. What would be  
15          the consequences to the city that would concern it if the  
16          matter were adjourned to Monday and Tuesday, the 23rd and  
17          24th?

18          MR. SHUMAKER: I'm sorry, your Honor. I was reading  
19          the e-mail that says that the witness would be available on  
20          Wednesday if that's -- I'm sorry -- moving the assumption  
21          motion --

22          THE COURT: 23rd and 24th.

23          MS. BALL: Your Honor, noting our objection to any  
24          adjournment to be in compliance with our best efforts, we do  
25          not believe that it will adversely affect any other provision

1 of the agreement.

2 THE COURT: Mr. Hackney.

3 MR. HACKNEY: Your Honor, I think that that would be  
4 helpful, and I would have one additional suggestion, which is  
5 that I think that the way we should use this adjournment is  
6 to, in addition to creating order on the litigation side, to  
7 create a little bit of space to see what happens with the  
8 mediation. That would be the purpose, in my mind. I would  
9 recommend then that -- I would recommend allowing depositions  
10 to complete at a time that's closer to the hearing so that we  
11 all don't remain in the same litigation scrum that we're  
12 currently in and have to --

13 THE COURT: What would you suggest, sir?

14 MR. HACKNEY: And the 23rd, your Honor -- I'm sorry.  
15 I don't have my --

16 THE COURT: 23rd is a Monday, Monday and Tuesday,  
17 the 23rd and 24th.

18 MR. HACKNEY: You know what? In bankruptcy  
19 litigation a lot of times the depositions will run up a  
20 little bit closer to the hearings, and I would say that I  
21 would do it -- I would cut it off on the Wednesday before.

22 THE COURT: That would be the 19th?

23 MR. HACKNEY: Yes, sir.

24 THE COURT: Any objection to that, Mr. Shumaker?

25 MR. SHUMAKER: Your Honor, we have the eligibility

1 track going on, and the nonexpert depositions are to be  
2 completed on the 23rd for that. The witnesses are also here  
3 and available tomorrow and Friday. We would propose --

4 THE COURT: Oh, I think you should go ahead with  
5 those regardless.

6 MR. SHUMAKER: And I think --

7 THE COURT: They're scheduled.

8 MR. SHUMAKER: I think that's --

9 THE COURT: And with a third of the city's witnesses  
10 next Wednesday.

11 MR. SHUMAKER: Yes. I think subject to what Ms.  
12 Ball has already said, then that would be fine with the city.

13 THE COURT: I'm sorry if I misunderstood you, Mr.  
14 Hackney. I thought you were talking about extending the  
15 opportunity for rebuttal witnesses' depositions through the  
16 19th.

17 MR. HACKNEY: That's correct.

18 THE COURT: All right. Sorry. Let's stick with the  
19 schedule you have for the city's witnesses' depositions.  
20 Okay. All right. Subject to the availability of a courtroom  
21 here in this building, we will reschedule the hearing on the  
22 assumption motion for the 23rd and the 24th. The Court will  
23 allow the city four hours and the objecting parties five  
24 hours, and I want you to work with your best efforts to come  
25 up with a joint statement on how the swaps and COP's work.



1 MR. SHUMAKER: We will do that, your Honor.

2 THE COURT: Yes. Okay. Let's turn our attention  
3 then to the city's motion for a protective order regarding  
4 the data room.

5 MR. SHUMAKER: Your Honor, you recall our colloquy  
6 last week about the data room, and consistent with my  
7 representation to you, the city filed the motion for  
8 protective order. I don't believe that there are any  
9 objections to it. It has to do with the access to the data  
10 room. Two of the things that have occurred, as reflected in  
11 the motion, are we have removed any requirement that the  
12 objectors or others with discovery rights sign an NDA, and we  
13 have also gone back to the city's pension actuary, Milliman,  
14 and essentially renegotiated that contract such that they no  
15 longer will require an NDA to access their materials. The  
16 only outstanding issue was, just for clarity purposes, that  
17 the city would still be able to redact personally  
18 identifiable information. There's very few documents -- I  
19 mean I think less than a handful -- that have Social Security  
20 numbers, home addresses, and even the city's own bank account  
21 number, but that's what the city seeks to do with this  
22 motion.

23 THE COURT: Anyone object to the city's redaction of  
24 personally -- of personal information? There was an  
25 objection or a request really, more appropriately stated,

1 that the city waive any NDA obligations of people who have  
2 already signed them and waive any releases that people  
3 entered into as a condition previously of entering into this  
4 room.

5 MR. SHUMAKER: We'll, of course, do that, your  
6 Honor.

7 THE COURT: You will. All right. One of the papers  
8 actually had proposed language, I think, to be added to the  
9 order that you seek. Did you see that language?

10 MR. SHUMAKER: I know that came in last night.  
11 Thank you.

12 THE COURT: Well, we don't have to review it now.  
13 Let me just ask you to work with --

14 MR. SHUMAKER: Certainly.

15 THE COURT: -- whoever filed that to see if you can  
16 agree upon the language and to submit an amended order  
17 through our order processing program.

18 MR. SHUMAKER: We will do that, your Honor.

19 THE COURT: Ms. Calton, did you want to be heard?

20 MS. CALTON: Yes, your Honor. Judy Calton for  
21 Detroit Entertainment, LLC, which is Motor City Casino. At  
22 present the casino has to file financial information  
23 regularly with the city under the Michigan Gaming Control  
24 Act, and under the Act that information is confidential, and  
25 it can't be subject of a Freedom of Information Act

1 disclosure. As far as I can tell, that information today is  
2 not in the data room. My client is concerned that its right  
3 for that information to be confidential maintains  
4 confidential or at least if they're going to feel that they  
5 should make it public that we have an opportunity for advance  
6 knowledge and to seek a protective order. And I feel kind  
7 of -- it's not a today issue, but we need to be protected in  
8 case tomorrow they decide to put it in there.

9 THE COURT: Any thoughts on this?

10 MR. SHUMAKER: Your Honor, we have no intention of  
11 putting the financial statements that Ms. Calton talks about  
12 in there. If for some reason that would change, we would  
13 endeavor to talk to counsel about that.

14 THE COURT: That representation sufficient for you?

15 MS. CALTON: Yes. Thank you.

16 THE COURT: All right. The motion is granted with  
17 the condition that the city seeks and the additional  
18 condition that we've discussed here. Please submit an order.  
19 Would anyone else like to raise anything else here today?  
20 All right.

21 MR. SHUMAKER: Your Honor, if I may, one --

22 THE COURT: Sir.

23 MR. SHUMAKER: I'm sorry. One issue that has arisen  
24 with the depositions -- and I don't have any firsthand  
25 knowledge of this, and I tread lightly given our exchange

1 last week, but apparently there has been some media inquiries  
2 about attending the depositions of Mr. Buckfire and Mr. Orr.  
3 I raise that because we want to avoid tomorrow or Friday some  
4 sort of situation where people are trying to get into the  
5 deposition room, the witnesses are prejudiced by, you know,  
6 the commotion, and we're just -- we're seeking whether --  
7 wondering if we could get some clarification from your Honor  
8 as to the fact that hopefully --

9 THE COURT: What's your position on whether it  
10 should be allowed or not?

11 MR. SHUMAKER: Well, the witnesses will be present  
12 on September 9th for the hearing, so obviously they will be  
13 present then. If your Honor wants us to provide a transcript  
14 from the deposition to the press, we could do that if need  
15 be, but I really am worried about crowd control, if you will,  
16 tomorrow where the deposition is going to take place.

17 THE COURT: Mr. Hackney.

18 MR. HACKNEY: I do share Mr. Shumaker's concerns  
19 just on the subject of crowd control. I had a suggestion for  
20 your Honor, which is -- I'm not entirely certain, I'll  
21 confess, about whether parties in interest in the case  
22 generally that haven't objected to the motion are entitled to  
23 appear at a deposition and ask questions. I'll just tell you  
24 that I just don't know the answer to that. From an orderly  
25 process --

1 THE COURT: The answer is no.

2 MR. HACKNEY: Okay. That's helpful because my  
3 suggestion was that the only people that be allowed to appear  
4 in person at the deposition would be parties that have  
5 objected and that perhaps could --

6 THE COURT: I agree with that.

7 MR. HACKNEY: -- communicate with me and Mr.  
8 Shumaker who they will be maybe I'll just say.

9 THE COURT: Um-hmm.

10 MR. HACKNEY: That will allow us to exercise some  
11 crowd control over the physical room we're taking the  
12 deposition in.

13 THE COURT: Um-hmm.

14 MR. HACKNEY: We have a conference call line that  
15 we're going to set up for people that want to listen in, and  
16 so that was requested by certain people that couldn't be in  
17 Detroit, and separately --

18 THE COURT: Certain attorneys representing parties  
19 who have filed objections?

20 MR. HACKNEY: Yes, for sure. Like I said, I didn't  
21 know coming to the podium today how parties in interest were  
22 handled in terms of their ability to even attend. And the  
23 idea of giving a transcript after the deposition would seem  
24 to address some of the public interest concerns that the  
25 people of the city legitimately have --

1 THE COURT: Um-hmm.

2 MR. HACKNEY: -- you know, so that would be our  
3 suggestion.

4 THE COURT: Um-hmm. Would anyone else like to be  
5 heard regarding this specific issue?

6 MR. PLECHA: Good morning, your Honor. Ryan Plecha  
7 again on behalf of the Retiree Association Parties. Because  
8 of the new nature of the retiree committee, I would request  
9 that they be allowed to attend even though they've not had  
10 the opportunity to file a formal objection at this point.

11 THE COURT: Um-hmm. Interesting point. Anybody  
12 object to that?

13 MR. HACKNEY: No, your Honor.

14 THE COURT: The Court will permit that then. All  
15 right. I do think it is appropriate to order that only  
16 parties plus a representative of the retiree committee to  
17 attend these depositions. The Court will order the release  
18 of the transcript of the depositions to the press upon their  
19 request but that no other members -- no other parties in the  
20 case or no members of the press otherwise be permitted to  
21 attend these depositions. Anything further yet? Thank you  
22 for bringing that up. All right. We'll be in recess then.

23 THE CLERK: All rise.

24 MR. HACKNEY: Thank you, your Honor.

25 THE CLERK: Court is adjourned.

1 (Proceedings concluded at 11:01 a.m.)

2 \* \* \*

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript  
from the sound recording of the proceedings in the above-  
entitled matter.

/s/ Lois Garrett

August 30, 2013

\_\_\_\_\_  
Lois Garrett